In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 323

WALLACE C. FRANKLIN, JR., REGIONAL COUNSEL, WAGE STABILIZATION BOARD, REGION X; JOSEPH A. JENKINS, CHIEF ENFORCEMENT ATTORNEY, WAGE STABILIZATION BOARD, REGION X; T. D. STARNES, ENFORCEMENT COMMISSIONER, 315 WILSON BUILDING, DALLAS, TEXAS, DEFENDANTS-APPELLANTS

v.

JONCO AIRCRAFT CORPORATION, A DELAWARE CORPORATION, OF SHAWNEE, OKLAHOMA, PLAINTIFF-APPELLEE

STATEMENT AS TO JURISDICTION

The Acting Solicitor General, on behalf of the defendants-appellants, and in compliance with Rule 12 of the Supreme Court of the United States, submits herewith a statement particularly disclosing the basis of the jurisdiction of the Supreme Court to review on appeal the judgment entered by the District Court in this case.

OPINION BELOW

The opinion of the three-judge United States District Court for the Northern District of Texas, Dallas Division, is not yet officially reported. A copy of the opinion is attached hereto as Appendix A.

JURISDICTION

The judgment of the district court, specially convened pursuant to 28 U.S.C. 2282, was entered on July 16, 1953. Petition for appeal was presented to that court on August 13, 1953 and rejected, and thereafter, on August 14, 1953, presented to a Justice of this Court. The jurisdiction of the Supreme Court to review herein by direct appeal the judgment is conferred by 28 U.S.C. 1253.

QUESTIONS PRESENTED

1. Whether the court below erred in holding Section 405(b) of the Defense Production Act, unconstitutional on the ground that it constituted an unlawful delegation of legislative power.

2. Whether the court below erred in failing to dismiss the complaint on the ground that the plaintiff, here appellee, should have been required to utilize and exhaust its administrative remedy.

3. Whether the court below erred in failing to dismiss the complaint on the ground that the proper party defendants were not named and could not, in fact, be reached in this suit.

4. Whether the court below erred in finding that the wage stabilization enforcement program had

been terminated, as to past violations of wage stabilization orders and regulations, by the termination, on April 30, 1953, of the substantive wage stabilization program itself.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Defense Production Act of 1950 (64 Stat. 798, as amended, 50 U.S.C. App. 2061 *et seq.*) and pertinent regulations issued thereunder are set forth or summarized in the statement and in the text demonstrating that the questions are substantial.

STATEMENT

A. FRAMEWORK PROVIDED BY THE DEFENSE PRODUCTION ACT AND REGULATIONS ISSUED THEREUNDER FOR WAGE STABILIZATION ENFORCEMENT

The primary remedy selected by Congress for the enforcement of wage stabilization policies and regulations, promulgated pursuant to Section 403(b)(5) of the statute (50 U.S.C. App. 2103(b)(5)), is set forth in Section 405(b) which provides (50 U.S.C. App. 2105(b)):

> (b) No employer shall pay, and no employee shall receive, any wage, salary, or other compensation in contravention of any regulation or order promulgated by the President under this title. The President shall also prescribe the extent to which any wage, salary, or compensation payment made in contravention of any such regulation or order shall be disregarded by the executive departments and other governmental agencies in determining the

costs or expenses of any employer for the purposes of any other law or regulation.[1]

The Act was implemented, both as to control and enforcement provisions, by appropriate delegation of Presidential power in a series of orders and regulations beginning with the issuance, on September 9, 1950, of Executive Order 10161, 15 F.R. 6105, which created the Economic Stabilization Agency. For the purposes of this case, only three of these regulations are of major significance. On July 28, 1952, the Economic Stabilization Administrator promulgated his General Order No. 18 (17 F.R. 6925, 9977) which created the National Enforcement Commission as an independent organ of

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[1] Section 405(b) was derived from Section 5(a) of the Stabilization Act of 1942, 50 U.S.C. App. 965(a). "This subsection adopts the language of the Stabilization Act of October 2, 1942, respecting the penalties to be applied for violations of the wage and salary stabilization program. The committee finds that the disallowance of illegal wage payments as a cost of doing business, for purposes of computing taxes, Government contract payments, and for purposes of establishing price ceilings, was an effective deterrent. * * *" S. Rept. 2250, 81st Cong., 2d Sess., p. 39.

The wage stabilization program under the 1942 Act was carried out by the National War Labor Board under the direction of the Economic Stabilization Director. E.O. 9250, 7 F.R. 7871, October 3, 1942. The stabilization power was extended three times (58 Stat. 643, 59 Stat. 306, 60 Stat. 664) and was terminated by Executive Order 9801, 11 F.R. 13435, on November 12, 1946. The application of administrative sanctions, pursuant to Section 5(a) of the 1942 Act and procedural regulations issued thereunder, to violations of wage stabilization policies and regulations which had occurred prior to November 12, 1946, was continued, by the processing of pending cases and the institution of new proceedings, until completed in 1949. See E.O. 9809, 11 F.R. 14281; United States Treasury Department, *Annual Report of the Commissioner of Internal Revenue, 1949*, pp. 26-27.

the Economic Stabilization Agency and described its organization and functions.[2] Pursuant to Section 4 of this regulation, the National Enforcement Commission was charged with the duty of determining, in cases instituted before it by other constituent organizations of the Economic Stabilization Agency, including the Wage Stabilization Board, whenever wages, salaries or other compensation had been paid in violation of the Defense Production Act. In making this determination, the Commission was directed by Section 4(d) to utilize the policies and standards contained in Economic Stabilization Agency General Order No. 15, 17 F.R. 2994, to be applied in prescribing disallowances under Section 405(b) after a finding of violation. Specifically, after referring to the various areas in which administrative sanctions could be applied, Section 4(b)(1) of General Order 15 provided that the amount to be disallowed would, initially, be the entire amount of the wage paid in violation of the statute, with a further proviso that less than the entire amount could be disallowed upon a showing of extenuating or mitigating circumstances. Section 4(b)(1) also provided, as a matter of "usual and general policy," that the disallowance would at least equal that portion of the payment in excess of the permissible payment.

[2] This re-establishment of the National Enforcement Commission was the last in a series of regulations describing the organization and functions of the enforcement arm of the wage stabilization program. See *e.g.*, 16 F.R. 6028; 16 F.R. 7284; 16 F.R. 10018. The order emphasized the distinction between substantive control and the enforcement program where violations of such control had occurred.

Section 4(b)(2) set forth in detail the circumstances which would be taken as extenuating or mitigating, including prompt disclosure, cooperation with investigating officials, prompt remedying of violations, the avoidance of repetition of violations, and the presence or absence of wilfulness.

These constituted the standards to be employed by the National Enforcement Commission in determining the sanction to be imposed. The procedure to be followed by the Commission was carefully set forth in Revised General Procedural Regulation No. 1, 17 F.R. 7737, effective August 21, 1952. Under this regulation, an enforcement proceeding required a complaint by the prosecuting agency, the right to answer and make appropriate motions, appearance through counsel on the part of respondent, a hearing, of which an official transcript was made, with the right to examine and cross-examine witnesses. Sections 2.1-2.7. Provisions were made for stipulation of facts, the issuance of subpoenas, and the presence of intervenors. Sections 2.7, 3.1, 3.2. The hearings were to be conducted regionally by a designated Enforcement Commissioner to whom proposed findings, recommendations, and briefs were to be submitted. Section 4.1. The Enforcement Commissioner was required to follow and apply the standards of General Order 15, *supra,* and to make his findings and determinations in writing, together with a recommendation as to the appropriate amount of disallowance, if any. Section 4.1. The Enforcement Commmissioner was fur-

ther required to file his findings and determinations with the National Enforcement Commission and to serve copies on the parties. Section 4.1. Equally elaborate provisions were set forth with regard to appeals to the National Enforcement Commission. Section 5.1. If no appeal were taken, the findings and recommendation of the Enforcement Commissioner, in the absence of clear error, were to be adopted by the Commission. Section 4.1(f). If an appeal were taken, the Commission, on the whole record, was empowered to affirm, modify, or reverse the Enforcement Commissioner, to remand the case for further hearing, or to dismiss the complaint. Section 5.2. The findings and determinations of the National Enforcement Commission were to be final. Section 5.2(c). Based on final disposition of the matter or upon stipulation, the National Enforcement Commission was authorized to issue a Certificate of Disallowance, fixing the amount to be disregarded by reason of the wage or salary violation. Sections 6.1, 8.1.[3]

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[3] It should be noted that this enforcement policy and procedure, virtually identical with enforcement practice from the outset of the stabilization program under the 1950 Act, was known to and approved by Congress. In 1951, the same administrative sanction was provided, as an additional remedy, in price violation cases. Section 405(a) of the Defense Production Act, as amended by Section 104(i) of the Defense Production Act Amendments of 1951, 65 Stat. 134. Further, the conference report on the 1952 Amendments to the Act stated that the "* * * conference substitute is not intended to preclude the Board from, as at present, enforcing wage stabilization regulations and policies." H.R. Conf. Rept. 2352, 82d Cong., 2d Sess., p. 24.

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B. FACTUAL BACKGROUND OF THIS CONTROVERSY

Plaintiff-appellee, hereinafter called Jonco, undertook the manufacture of aircraft tools and parts at Shawnee, Oklahoma, in the spring of 1951. Actual operations began in July, 1951, at which time employees were hired and wages were paid. A New Plant Report setting forth interim wage rates, as required by Wage Stabilization Board General Wage Regulation No. 9, Section 3(d), was not filed by Jonco until November 3, 1951. This report, after being perfected, came to the Wage Stabilization Board, Region X, on or about January 24, 1952. Thereafter, on July 2, 1952, the Regional Wage Stabilization Board partially approved and partially modified the interim wage scales and directed the filing of a modified report as to plant employees. After several extensions at Jonco's request, a revised New Plant Report was filed and, on August 29, 1952, the Regional Board approved and revised New Plant Report, subject to certain modifications as to shop classifications. Jonco did not, at that time, cut back its rates to conform to the rates so approved. However, within the time permitted, Jonco filed a petition for reconsideraiton. On November 6, 1952, the Regional Board, with two public members dissenting, approved Jonco's petition for reconsideration and, accordingly, Jonco's interim rate scale in its New Plant Report.

By reason of the dissent of the two public members, the matter was transferred to the Wage Stabilization Board, Washington, D. C., in accordance

with the provisions of General Wage Procedural Regulation No. 1. On February 2, 1953, the Wage Stabilization Committee modified the interim wage rates set forth in Jonco's original New Plant Report.[4] On February 3, 1953, Jonco filed a request for reconsideration by the Wage Stabilization Committee.

On February 6, 1953, Executive Order 10434 was issued. 18 F.R. 809. This order suspended the further administration of regulations and orders issued pursuant to the Defense Production Act of 1950, as amended, with regard to stabilization of wages, salaries, and other compensation. Automatic approval was granted to petitions for approval, based upon agreements, then pending before the Committee. In the case of petitions other than those based upon agreements, notifications were sent out that no further action could be taken in view of the suspension of the program. A letter of this type was sent to Jonco.

Executive Order 10434 specifically provided that it did not "* * * operate to defeat any suit, action, prosecution or administrative enforcement

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[4] On December 6, 1952, the Chairman of the Wage Stabilization Board in Washington resigned and, on the same day, the industry members of the Board also resigned. On December 15, 1952, the Economic Stabilization Administrator designated the remaining public members of the Board as the Wage Stabilization Committee. General Order 19, 17 F.R. 11368. The stated purpose of this order was to provide an interim administration of the wage stabilization program while the Board was rendered inoperative by the resignation of the industry members. The interim administration was to terminate as soon as the Board was again rendered operative by the appointment of industry members.

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proceeding, whether heretofore or hereafter commenced, with respect to any right, liability, or offense possessed, incurred, or committed, prior to * * *" February 6, 1953.

C. THE PROCEEDINGS HEREIN

On April 1, 1953, the Regional Counsel of the Wage Stabilization Board filed a complaint, pursuant to National Enforcement Commission General Procedural Regulation No. 1, *supra*, against Jonco, alleging violations of the Defense Production Act and regulations issued thereunder. Specifically, the complaint, as amended, charged that Jonco had failed to comply with filing requirements between July, 1951 and November, 1951, and, further, that Jonco had failed to modify and adjust rates of pay to 103 shop employees as required by the August 29, 1952 ruling of the Wage Stabilization Board on the New Plant Interim Report. The administrative complaint alleged that this violation continued from August 29, 1952 until February 2, 1953.[5] On May 8, 1953, the National Enforcement Commission in Washington notified Jonco that a hearing would be held before Enforcement Commissioner Starnes in Dallas on May 19, 1953. The hearing was continued, by order of the Commissioner, until May 27, 1953.

[5] As shown above, the regional action of November 6, 1952, was, by reason of the dissent of two public members, transferred to the National Committee which set aside the approval. Where two public members dissented, finality was not accorded to regional action of this type. The case could be automatically transferred to Washington for consideration by the National Committee at the request of the public members.

The instant proceeding was instituted on May 18, 1953, by a complaint seeking to enjoin the holding of the administrative enforcement hearing, and requesting that a three-judge court be convened pursuant to 28 U.S.C. 2284. After referring to the underlying facts, the statute, and certain of the applicable regulations and orders, the complaint alleged that Jonco would suffer irreparable injury by being subjected to an invalid administrative procedure, forced to undergo expense and loss of time in defending itself against the invalid administrative procedure, unlawfully bound without appeal by the decision of the illegal Wage Stabilization Committee, subjected to the possibility of a substantial tax penalty, and threatened by impairment of its credit standing. Jonco charged that Section 405(b) of the Defense Production Act was unconstitutional in that it permitted the exercise of judicial function by the executive branch and imposed a fine or penalty contrary to the Fifth Amendment, and that the fine or penalty was excessive and took Jonco's property without due process of law. Further, the complaint charged that the creation of the Wage Stabilization Committee was unauthorized and contrary to Section 403(b) of the Defense Production Act and that the Committee's decision of February 2, 1953 was invalid. Finally, the complaint charged that the administrative enforcement powers under the wage stabilization program had expired on April 30, 1953.

A temporary restraining order was issued *ex parte* by District Judge Atwell on May 18, 1953, and continued on May 27, 1953, until June 10, 1953, the date set for the hearing on Jonco's application for a preliminary injunction.[6] At the hearing, held on June 11, 1953, the district court indicated that it considered the matter ripe for final disposition. Argument was heard and the court's opinion, Judge Hutcheson dissenting, was announced on July 15, 1953.[7] Essentially the court appears to have held Section 405(b) of the Defense Production Act to be unconstitutional as an unlawful delegation of legislative power. An order permanently enjoining the hearing was entered on July 16, 1953.

THE QUESTIONS ARE SUBSTANTIAL

The decision of the court below destroys the foundation of the wage stabilization enforcement program both as to past and present proceedings. Under Section 405(b) of the Defense Production Act, tax disallowances have already been certified by the National Enforcement Commission in approximately 2,000 cases.[8] In over 400 additional cases, disallowances, stipulated or determined by the Commission, have not yet been certified. Approximately 100 other cases are still being proc-

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[6] A stipulation as to certain of the facts was entered into by the parties on May 25, 1953.

[7] As indicated above, the majority opinion and Judge Hutcheson's dissenting opinion are attached hereto as Appendix A.

[8] We have been advised that, although Section 405(b) permits the use of a variety of administrative sanctions, tax disallowances alone have been used.

essed before the Commission or by negotiation. In these additional cases, the estimated dollar amount is two million dollars.

A multiplicity of tax refund claims and suits will inevitably flow from the decision below if it stands uncorrected, since it declares to be unconstitutional the statutory basis for all past tax disallowances under the wage stabilization program. Applicable statutes of limitations on claims for refund and tax refund suits have not yet run as to most, if not all of the disallowances under the Act of 1950. We believe that decision to be plainly wrong and that the magnitude of the error is underscored if the decision be examined against the background of its far reaching practical impact.

I

Congress Possesses the Power to Utilize Administrative Enforcement and Has Validly Exercised That Power in Section 405(b) of the Defense Production Act.

For the purpose of this heading, we will assume that the constitutional issue was available for decision in the court below. The single sentence dealing with that issue, the core of decision in the court below, is as follows:

> Upon such questions as the delegation of legislative power, there is a line of decisions which classes it unconstitutional. See Carter v. Carter Coal Co., 298 U.S. 238; Panama Refining Co. v. Ryan, 293 U.S. 388. There are no standards with which the President could be guided in determining the policy, or, wishes of Congress.

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We do not read this as meaning that those portions of the Defense Production Act which deal with the prescription of maximum wages and salaries are invalid as unlawful delegations of legislative power. Almost identical provisions and standards, laid down by Congress for guidance in establishing maximum prices, have been sustained by this Court against the charge of unlawful delegation. *Yakus* v. *United States*, 321 U.S. 414. A charge of unconstitutionality on this score would present no substantial question. Cf. *California Water Service* v. *Redding*, 304 U.S. 352, 356.

By necessary inference, then, the court below has applied its holding of unlawful delegation to Section 405(b), *supra*.[9] In view of the argument presented below by plaintiff, the holding could rest on two grounds: First, that Congress lacked power to utilize administrative enforcement, and; second, that Congress failed adequately to provide guidance for the application of the administrative enforcement technique selected. There is, we submit, little substance to either of these views.

Congress may, where it deems the method appropriate, rest the enforcement of statutes up to and including the imposition of sanctions, exclusively with an executive or administrative agency. "* * * Congress has long delegated to executive officers or executive agencies the determination of complicated questions of fact and of law. * * *."

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[9] In a proceeding pursuant to 28 U.S.C. 2282, only an act of Congress is open to attack. *Jameson & Co.* v. *Morgenthau*, 307 U.S. 171, 173.

Switchmen's Union v. *Mediation Board*, 320 U.S. 297, 303; *Estep* v. *United States*, 327 U.S. 114, 120; *Lichter* v. *United States*, 334 U.S. 742. And the availability of this selection of remedy or sanction is not affected by the use, in the enforcement scheme, of a money penalty. "* * * [T]he legislation of Congress from the beginning, not only as to tariff but as to internal revenue, taxation and other subjects, has proceeded on the conception that it was within the competency of Congress, when legislating as to matters exclusively within its control, to impose appropriate obligations and sanction their enforcement by reasonable money penalties, giving to executive officers the power to enforce such penalties without the necessity of invoking the judicial power." *Oceanic Navigation Co.* v. *Stranahan*, 214 U.S. 320, 339; see, also, *Lichter* v. *United States, supra; United States* v. *Ju Toy*, 198 U.S. 253; *Passavant* v. *United States*, 148 U.S. 214. Further, no invalidity attaches to such a Congressional choice because finality is to be accorded to the conclusion reached by the administrative agency. "* * * Apart from constitutional requirements, the question whether judicial review will be provided where Congress is silent depends on the whole setting of the particular statute and the scheme of regulation which is adopted. *Switchmen's Union* v. *Mediation Board*, 320 U.S. 297, 301. And except when the Constitution requires it, judicial review of administrative action may be granted or withheld as Congress chooses." *Estep* v. *United States*, 327 U.S. 114, 120; *Crane* v. *Halo*, 258 U.S.

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142; *Spaulding* v. *Douglas Aircraft Co.*, 154 F. 2d 419, 427 (C.A. 9); *Henrietta* v. *Starling*, 270 U.S. 243; cf. *Textile Mills Co.* v. *Commissioner*, 314 U.S. 326 and *Lykes* v. *United States*, 343 U.S. 118.[10]

Thus, the power of Congress to utilize administrative enforcement in the wage stabilization program is clear. It is equally clear that this is precisely what Congress has done. As indicated above, fn. 1, Congress specifically derived Section 405(b) of the 1950 Act from Section 5(a) of the Stabilization Act of 1942, and the administrative enforcement procedure under the 1950 Act followed the pattern established the administration of the earlier stabilization program. The use of the 1942 statutory enforcement scheme was placed on the express ground that it provided "* * * an effective

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[10] We do not suggest that there is no avenue of judicial review open to Jonco. Determinations that wage regulations have been violated and certification of appropriate deductions would, if supported by evidence, not be subject to reversal. However, constitutional questions and appropriate legal issues could be litigated in tax refund suits. *Woodworth Co.* v. *Kavanagh*, 102 F. Supp. 9 (E.D. Mich.), affirmed, 202 F. 2d 154 (C.A. 6); cf. *Weather-Seal Mfg. Co.* v. *Commissioner*, 16 T.C. 1312, affirmed, 199 F. 2d 376 (C.A.D.C.). As indicated above, fn. 8, the tax disallowance sanction alone has been utilized. If other available sanctions were imposed, *viz.* a contract or renegotiation disallowance, suits could be instituted in the Court of Claims or the Tax Court.

There is, of course, no merit to the apparent suggestion by the court below that the imposition of administrative sanctions must be preceded by court approval or that they must be achieved through judicial enforcement. Aside from the lack of basis for this view in the cases which point to the opposite conclusion, the limitation would destroy the only effective method of wage stabilization enforcement developed during two periods in which national exigencies have made wage stabilization imperative.

deterrent * * *" against violations of wage and salary regulations. S. Rept. 2250, 81st Cong., 2d Sess., p. 39.

There remains only the question whether Section 405(b) furnishes adequate guidance. The text of the statute is sufficient answer. By the first sentence of the section, Congress made illegal the entire wage payment in contravention of a maximum wage regulation. "No employer shall pay, and no employee shall receive, any wage * * * in contravention of any regulation or order promulgated by the President under this title." The second sentence of the section not only provides the method of enforcement, namely, a Presidential directive as to executive or administrative disallowances, but also creates in the President the power to remit some or all of the illegal payment thus prescribed. Specifically, Section 405(b) directs the President to prescribe "* * * the extent to which any wage * * * payment made in contravention * * * shall be disregarded * * *"[11]

Thus, by legislative directive, Congress has declared the entire illegal payment to be forfeit. The President is authorized to select the agency in which

[11] Section 4 of General Order 15, *supra*, precisely follows the language of Section 405(b), reiterating the maximum disallowance, detailing specific extenuating or mitigating circumstances, and establishing a minimum disallowance for violations, as a matter of policy, in the amount of the illegal excess of the payment made in contravention.

There is a striking parallel between this statutory enforcement scheme and the statutory scheme in common use in far more severe circumstances, namely, provisions in criminal statutes which prescribe the maximum sentence and convey a flexible power to impose a lesser sentence.

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the application of the forfeiture is to be made. Further, the President is empowered to remit the penalty to the degree deemed justified in the circumstances of each case.

Adequate guidance is thus clearly furnished for enforcement. Far more flexible standards, suited to and necessary for the implementation of congressional policies, have been sustained. *Lichter* v. *United States, supra; American Power Co.* v. *S.E. C.*, 329 U.S. 90, 104; *Sunshine Anthracite Coal Co.*, v. *Adkins*, 310 U.S. 381; *Federal Trade Commission* v. *Kappel & Bro.*, 291 U.S. 304; *Opp Cotton Mills* v. *Administrator*, 312 U.S. 126; *Hampton & Co.* v. *United States*, 276 U.S. 393. Here, as we have shown above, Congress has expressly found that Section 405(b) provides the most, if not the only, effective method of enforcement in a wage stabilization program undertaken in time of national crisis.

II

The Court Below Should Have Dismissed the Complaint as Premature and for Want of Equity

For the purpose of discussion in Point I, we assumed that the constitutional question could properly be reached by the court below. In fact, the complaint should have been dismissed on earlier grounds.

1. As stated by Judge Hutcheson in his dissent below, this proceeding was "* * * nothing more than a premature attack upon an administrative proceeding which is now only in its first stages * * *." In failing to require Jonco to comply with and exhaust the complete administrative procedure set forth in

General Procedural Regulation No. 1, *supra*, the decision below is "at war with the long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51; *McCauley* v. *Waterman Steamship Corp.*, 327 U.S. 540; *Aircraft and Diesel Corp.* v. *Hirsch*, 331 U.S. 752; *Federal Power Commission* v. *Arkansas Power & Light Co.*, 330 U.S. 802; *SEC* v. *Otis & Co.*, 333 U.S. 843 (summarily decided on the basis of the previous cases, at the time of granting of certiorari); *Far Eastern Conference* v. *United States*, 342 U.S. 570.

The considerations of orderly procedure on which the rule is based make obvious its applicability in this case. If the hearing had been permitted, the Enforcement Commissioner might have decided that no violation had occurred or, if a violation had occurred, that no disallowance was warranted by reason of the surrounding circumstances. The matter would here have ended. If, on the other hand, the Commissioner had held that disallowance should be made, Jonco had an appeal as of right to the National Enforcement Commission. The Commission might have sustained any or all of Jonco's defenses. Again, there would have been no need for resort to the courts.

No exception to the rule requiring exhaustion of administrative remedies is created by claims, such as those put forward by Jonco in the court below, of constitutional invalidity or lack of statutory cov-

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erage. On the contrary, this Court has often recognized that exhaustion of administrative procedure may obviate need for judicial consideration of constitutional or statutory issues, a factor emphasizing the soundness of compelling primary recourse to the appropriate administrative tribunals. *Aircraft and Diesel Corp.* v. *Hirsch*, 331 U.S. at pp. 772-773; *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. at pp. 50-51.

2. There is a further threshold ground upon which the court below should have dismissed the complaint, Jonco's failure to show irreparable injury.

A showing of irreparable injury is, of course, crucial to the exercise of the equity jurisdiction which was here invoked. And there is no exception with the need for this showing by reason of the fact that the suit is brought to enjoin a proposed governmental proceeding. On the contrary, the doctrine of exhaustion of administrative remedies, discussed and imposed in the cases set forth above, emphasizes the requirement.

The court below found irreparable the injury to lie in the fact that Jonco might, in the future, be subjected to a large penalty or damaging sanction after a final unfavorable decision by the National Enforcement Commission after appeal to it by Jonco.[12] In support of its conclusion that this pos-

[12] The court derived this view from indefinite allegations in an affidavit filed by Jonco's president which conjectures as to the possibility of damage to Jonco if a substantial penalty were to be finally imposed by the National Enforcement Commission.

sibility constituted a showing of irreparable injury, the court below noted the inability of defendants-appellants to guarantee that penalties would not be imposed on Jonco in the future since they had no control over decisions by the National Enforcement Commission.

We submit that the basis accepted by the court below for its finding of irreparable injury demonstrates the exact opposite, namely, that there was no showing of any possible injury to Jonco at all as the result of the holding of the hearing by defendants-appellants or by the purely advisory opinion which might have been issued by the Enforcement Commissioner at the termination of the hearing. It seems perfectly plain, and the court below seems to recognize the fact, that the National Enforcement Commission in Washington alone had power to reach final decision and to certify disallowance. The National Enforcement Commissioners in Washington were not, of course, and could not be made, parties to this proceeding. *Employers Group* v. *National War Labor Board*, 143 F. 2d 145 (C.A. D.C.); *National War Labor Board* v. *Montgomery Ward & Co.*, 144 F. 2d 528 (C.A.D.C.).

The only remaining possibilities with regard to a showing of irreparable injury are set forth in the affidavit by Jonco's president. This affidavit alleges generally the expense, inconvenience and "grief" which will be inflicted on Jonco by the administrative enforcement proceeding. Reference is made to certain losses of orders by Jonco though this loss is not clearly stated to have been caused by the pro-

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posed hearing. Allegations of this type, even if made in more definite form than those contained in the affidavit in this case, do not suffice to sustain the burden of showing irreparable injury. It is well settled that the expense and time consumption attributable to the holding of an administrative hearing, or to any trial, is not recognized by equity as a sufficient basis for injunctive relief. *Petroleum Service Corp.* v. *Public Service Commission,* 304 U.S. 209; *Myers* v. *Bethlehem Shipbuilding Corp.,* 303 U.S. at pp. 51-52; *Bradley Lumber Co.* v. *NLRB,* 84 F. 2d 97, 100 (C.A.).

III

The Power to Conduct Administrative Enforcement Proceedings with Regard to Past Wage Stabilization Violations Did Not Expire on April 30, 1953.

The court below observed: "It is also contended, and the contention seems to be correct, that the National Enforcement Commission has not been continued in existence by any executive order after April 30, 1953." This observation was presumably intended to mean, as a possible alternative ground of decision, that the power to continue administrative enforcement with regard to past violations of wage stabilization regulations and orders had been terminated on that date.

The Wage Stabilization Board was created by Title IV of the Defense Production Act of 1950, as amended in 1952, and the power to administer the substantive wage stabilization program was vested in the Board. Section 403(b)(c) and (d),

50 U. S. C. App. 2103(b)(c) and (d), 64 Stat. 807, 66 Stat. 300. The Defense Production Act Amendments of 1952 also specifically provided that "all authority conferred" under Title IV should terminate at the close of April 30, 1953. Section 717(a) of the Defense Production Act of 1950, 50 U. S. C. App. 2166(a), as amended by Section 121(b) of the 1952 Amendments, 66 Stat. 306.[13] Section 717(b)(3) of the 1950 Act, as amended, provided that (50 U. S. C. App. 2166 (b)(3), as amended by the Act of June 30, 1951, 65 Stat. 110):

> Any agency created under this Act may be continued in existence for purposes of liquidation for not to exceed six months after the termination of the provision authorizing the creation of such agency.

Certain basic results flowing from the above mentioned statutory provisions are clear. The Wage Stabilization Board was created under Title IV and the substantive wage stabilization power which it has exercised stems from the same title. The substantive power to regulate wages, suspended by Executive Order on February 6, 1953, was terminated by the statute as of April 30, 1953. Agencies created by Congress under Title IV, such as the Wage Stabilization Board, were physically to go out of existence by October 31, 1953.

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[13] As indicated above, Executive Order 10434, 18 F. R. 809, suspended the substantive administration of the wage stabilization program on February 6, 1953. This Presidential suspension was decreed pursuant to authority contained in Section 717(b)(1) of the 1950 Act. 50 U.S.C. App. 2166(b)(1).

In the opinion of the court below, these provisions went further and cut off the administrative enforcement program, under Section 405(b), on April 30, 1953. This conclusion was apparently reached by a literal reading of Section 717(a), as amended in 1952, which terminated, as of April 30, 1953, "* * * all authority conferred * * *" under Title IV.

But the statute itself, as well as its historical background and administrative interpretation, demonstrates that Congress did not intend that violators of the maximum wage provisions before their expiration should be relieved from liability—even though determination of that liability was achieved by administrative action. The termination of authority under Section 717(a) related to the substantive wage stabilization program, the power to prescribe maximum wages by regulation and order, and not to the termination, at an incomplete stage, of the enforcement proceedings with regard to past violations of wage orders. In weighing Congressional purpose on the point, it should be remembered that the enforcement program with regard to price and rent violations continues,[14] although the substantive price and rent control programs have been terminated. There is no reason to believe that Congress had any different intent as to wage order violators.

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[14] The continuation of these enforcement programs is based on Section 706(b), the Savings provision of the 1950 Act and on E.O. 10434, issued on February 6, 1953. Both of these sources are discussed in the text above.

The savings clause, which supports this position (quoted and discussed below), must be read in the light of the similar clause in the 1942 Act upon which it was modelled and the manner in which the latter was applied before the 1950 Act was enacted. Congress expressly patterned the Section 405(b) administrative enforcement remedy, with regard to wage stabilization violations, on Section 5(a) of the 1942 Stabilization Act and the enforcement procedures worked out under that Act. S. Rept. 2250, 81st Cong., 2d Sess., p. 39. In view of this conscious choice, the interpretation and application of the 1942 statute, as to the continuation of enforcement against past violators after suspension of the substantive control program, may be taken as strong evidence of Congressional purpose in the 1950 Act.

The substantive authority under the 1942 Act was terminated by Executive Order in 1946. E.O. 9801, 11 F.R. 13435. The administrative enforcement program against violators of the 1942 Act, prior to its termination, was continued until completed in 1949, and included not only the processing of pending proceedings but also the institution of new proceedings after the suspension of the substantive control program. United States Treasury Department, *Annual Report of the Commissioner of Internal Revenue*, 1949, pp. 26-27; *Annual Report of the Commissioner of Internal Revenue*, 1947, p. 62.[15] The authority pursuant to which the

[15] The function of applying the tax deduction disallowance sanction with regard to violations of the World War II wage

administrative enforcement proceedings were thus completed was the same in effect as that available for completion of administrative enforcement proceedings in the present wage stabilization program. The 1946 Executive Order, after terminating all "effective" wage orders and controls, providing that:

> * * * as to offenses committed or rights or liabilities incurred prior to the date hereof the provisions of such effective orders and regulations shall be treated as still remaining in force for the purpose of sustaining any proper suit, action or prosecution with respect to any such right, liability or offense.

The 1946 Executive Order derived from Section 901(b) of the Emergency Price Control Act of 1942, 56 Stat. 23, 767, which provided:

> * * * except that as to offenses committed, or rights or liabilities incurred, prior to such termination date, the provisions of this Act and such regulations, orders, price schedules, and requirements shall be treated as still remaining in force for the purpose of sustaining any proper suit, action, or prosecution with respect to any such right, liability, or offense.

With full knowledge of the 1942 statutory scheme and enforcement program, Congress provided a

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stabilization program was transferred to the Department of Treasury on December 12, 1946. Section 10(b) of Executive Order 9809, 3 C.F.R. 1946 Supp., p. 185. The Treasury regulation authorizing this tax deduction allowance was in effect when the Defense Production Act of 1950 was enacted and is still in effect today. 26 C.F.R. (Parts 1-79, 1949 Ed.), p. 217.

savings clause, almost identical with that contained in the 1942 legislation, which states (Section 706(b) of the 1950 Act, 50 U. S. C. App. 2156(b)):

> * * * termination of the authority granted in any title or section of this Act, or of any rule, regulation, or order issued thereunder shall not operate to defeat any suit, action, or prosecution, whether theretofore or thereafter commenced, with respect to any right, liability, or offense incurred or committed prior to the termination date of such title or of such rule, regulation, or order.

The statutory savings clause was implemented by Executive Order 10434 of February 6, 1953, which, after suspending the substantive wage stabilization program, specifically provides that it:

> * * * shall not operate to defeat any suit, action, prosecution, or administrative enforcement proceeding, whether heretofore or hereafter commenced, with respect to any right, liability, or offense possessed, incurred, or committed, prior to this date.

These savings provisions were plainly meant to assure that the termination date of the statute did not free past violators from liability for their misconduct—whether the procedure for ascertaining the fact of violation and imposing the sanction was judicial or administrative. In each case, "* * * any suit, action or prosecution * * *" words plainly understood by Congress to include administrative proceedings, as the prior history shows—is pre-

served for the purpose of reaching violations which occurred prior to the termination of the substantive control program. In each case, no distinction is made with regard to the commencement date of the suit, action or prosecution. Both statutes specifically authorize the institution of enforcement proceedings after, as well as before, the termination of the substantive program, so long as the violations occurred while the maximum wage controls were applicable. In the 1953 Executive Order under the 1950 statute, the draftsman has specifically preserved such proceedings "* * * whether theretofore or thereafter commenced. * * *." The same effect was achieved in the 1942 Act and the 1946 Executive Order by the technique of preserving the existence of regulations or orders for the sole purpose of enforcement.[16]

Even if the 1950 Act be read alone, without regard for its historical context, a reading of Section 717(a) and Section 706(b) together leads to the same conclusion. Section 717(a) terminates "all authority conferred" by Title IV. Section 706(b) provides that the "* * * termination of the authority granted in any title or section of this Act * * * shall not operate to defeat any suit, action, or prose-

[16] The continuing Congressional policy embodied in the General Savings Statute, and the language of that act, 1 U.S.C. 109, would, if applied here, require the same conclusion as that dictated by the materials discussed above. The preservation of "* * * any proper action or prosecution for the enforcement of such penalty * * *" by the General Savings Statute has been held to sustain the application of administrative orders to violations of a substantive jurisdiction which terminated before the administrative sanction was applied. See *Eastern Coal Corp.* v. *NLRB*, 176 F. 2d 131 (C.A. 4).

cution, whether theretofore or thereafter commenced, * * *." Thus, a clear distinction is made between the substantive stabilization program, the "authority conferred" by Title IV, and the enforcement proceedings which are specifically preserved until completion.

Textual examination, as well as examination of the clear historical model, thus make it plain that Congress did not propose to cut off the enforcement program but, in terminating "* * * all authority conferred * * *" by Title IV, referred only to the substantive authority to regulate wages.

There remains the question whether the physical termination of agencies created under Title IV would operate to defeat this power, a question which arises only by reason of the erroneous action of the court below. Absent the injunction, the enforcement proceeding herein would have been speedily completed under administrative schedules.

Section 717(b)(3) provides that agencies created under the Defense Production Act are to continue "in existence for purposes of liquidation for not to exceed six months after the termination of the provision authorizing the creation of such agency." Concededly, agencies such as the Wage Stabilization Board, created by Congress under Title IV of the Act, will go out of existence on or before October 31, 1953. To say this falls far short of saying that the power to administer the enforcement program must fail, whether or not complete, at that time. As already noted, the power to enforce is specifically vested, not in any agency

created by the Defense Production Act, but in the President and can be carried out by him directly or by delegation to any appropriate agency. In 1946, when the 1942 Act expired, similar authority as to enforcement against past wage violators was delegated to the Treasury Department, an agency whose existence was not dependent upon the expiring statute. There is no reason to believe that the President has any less authority under the 1950 Act. We will advise the Court, no later than October 31, 1953, as to the action taken by the President, in designating an agency which is to continue the wage enforcement proceedings to completion.[17]

CONCLUSION

For the reasons set forth above, the judgment of the court below should be reversed and the permanent injunction vacated.

Respectfully submitted,

(S.) ROBERT L. STERN,
Acting Solicitor General.

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[17] Where, as here, a continuing power of enforcement is vested in the President, we doubt the necessity of precise Congressional direction as to the manner in which that power is to be implemented. That it is to be implemented is a necessary concomitant of the savings provision. The broad and continuing investigatory powers granted to the President by Section 705, 50 U.S.C. App. 2155, have importance principally by being viewed as ancillary to continuing powers of enforcement. And, aside from inference, Section 703(a), 50 U.S.C. App. 2153(a), expressly conveys to the President the widest latitude in implementing his power by delegation. It should be noticed that the power conferred upon the President by Section 703(a) was extended until June 30, 1955, by Section 11 of the Defense Production Act Amendments of 1953. 64 Stat. 798.

APPENDIX A

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION

Civil No. 5122

JONCO AIRCRAFT CORPORATION, PLAINTIFF

vs.

WALLACE C. FRANKLIN, JR., REGIONAL COUNSEL, WAGE STABILIZATION BOARD, REGION 10; JOSEPH A. JENKINS, CHIEF ENFORCEMENT ATTORNEY; T. D. STARNES, ENFORCEMENT COMMISSIONER, 315 WILSON BUILDING, DALLAS, TEXAS, DEFENDANTS

OPINION

HUTCHESON, *Chief United States Circuit Judge.*
ATWELL, *Chief United States District Judge.*
DAVIDSON, *United States District Judge.*

ATWELL, *Chief United States District Judge:*

The plaintiff is a Delaware corporation with its principal office in Shawnee, Oklahoma. The defendants are citizens of Dallas, Texas. More than $5,000.00 are involved, exclusive of interest and costs.

The plaintiff seeks relief from a threatened hearing before the defendant on complaint filed by the Wage Stabilization Board, alleging that it is not in compliance with the orders and statutes of the

United States. That a hearing by said Board, and the consequent penalties and punishments, for which the plaintiff has no legal remedy at law, make it imperative that such hearing be not held, and that a restraining order issue from this court.

After a careful analysis of the plaintiff's bill, the court concluded and called for the organizing of a three-judge court in accordance with the statute, and, thereupon, Senior United States Circuit Judge of the Fifth Circuit, was notified, and regulation notices were given to the Attorney General of the United States.

Such three-judge court heard the complaint, the answer thereto, and the arguments and testimony thereon, on Thursday, June 11th, 1953, and conclude that the temporary restraint should be made permanent.

The plaintiff is engaged in the manufacture of precision tools and parts for the aircraft industry, and its plant is in Shawnee, Oklahoma. It is the largest producer of its kind in the mid-west, operating under fifteen prime national defense contracts, which include a majority of principal manufacturers of military aircraft. In excess of 98% of its production is for the national defense.

The defendants assert the power, as shown under E.S.A. General Order No. 15, to disallow a prior and unauthorized alleged payroll of plaintiff as of November 24th, 1952, in the amount of $111,000.00, in addition to a total payroll of $575,000.00 for the period August 29, 1952 to February 2, 1953.

That such a burden and injury, because of the deprivation of Internal Revenue tax requirements and other penalties, fines, and indictments, the

plaintiffs sought court refuge. See Defense Production Act 1950, as amended, 66 Stat. 296, U.S.C. Title 50 app., Sec. 2061; also General Order No. 15. 17 Federal Register 2994. Treating of the disallowance of wage payments, even for the entire amount. That such determination "shall be final and not subject to review by the Tax Court of the United States, or, by any court in any civil proceeding. See also Bureau Internal Revenue ruling IT-4105, wherein it announces disallowance for tax purposes wage payments in amount certified to it by the economic stabilization agency. No provision is made for the review of such certifications by the Bureau of Internal Revenue."

The recital of the above is sufficient without going through the entire category, to show the seriousness of the penalties liable to be imposed upon the plaintiff.

The allegation is made that such Defense Production Act as amended, is unconstitutional.

See such cases as United States v. Butler, 297 U.S. 1; Bailey v. Drexel Furniture Co., 295 U.S. 20; United States v. Constantine, 296 U.S. 287; Lilly v. Commissioner of Internal Revenue, 343 U.S. 90, and National Life Ins. Co. v. United States, 277 U.S. 508.

Upon such questions as the delegation of legislative power, there is a line of decisions which classes it unconstitutional. See Carter v. Carter Coal Co., 298 U.S. 238; Panama Refining Co. v. Ryan, 293 U.S. 388. There are no standards with which the President could be guided in determining the policy, or, wishes of Congress.

An order of the Board is subject to review by the designated court, and only when sustained by the

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court may the order be enforced. Upon that review all questions of the jurisdiction of the Board and the regularity of its proceedings, all questions of constitutional right, or, statutory authority, are open to examination by the court. Jones & Laughlin vs. Labor Board, 301 U.S. 45. See also Stark v. Wickard, 321 U.S. 309; Social Security Board v. Nierotko, 327 U.S. 369; St. Joseph's Stockyards Co. v. United States, 298 U.S. 73. And these holdings support plaintiff's entrance here, and it is not obliged to pursue any so-called administrative remedy.

However, defendants contend that since the General Savings Statute, 1 U.S.C.A. 109, saves the liability for illegal wage payments made during the life of the Act, therefore, per force administrative enforcement continues. That statute is concerned only with the preservation of judicial proceedings. U. S. v. Hark, 49 F. Supp. 95, reversed on other grounds, 320 U.S. 531, 64 S. Ct. 359, 88 L. Ed. 290, rehear. den. 321 U.S. 802, 64 S. Ct. 517, 88 L. Ed. 1089; Rogers v. U. S., 158 F. 2d 835 (C.C.A. 6), reversed on other grounds, 332 U.S. 371, 68 S. Ct. 5, 92 L. Ed. 3.

It is also contended, and the contention seems to be correct, that the National Enforcement Commission has not been continued in existence by any executive order after April 30, 1953. The Complaint against the plaintiff was issued on April 1, 1953, by the Board which acted through defendant Franklin, and who still purports to act. However, there has been no Wage Stabilization Board since December, 1952, when its members resigned.

Quite recent decisions in this field may be found in Woodworth v. Kavanaugh, 102 F. (s) 9, affirmed

202 F. (2d) 154. Also in Aircraft and Diesel Equipment Corporation v. Hirsch, 331 U.S. 752, Mr. Justice Rutledge said, "* * * The presence of constitutional questions, coupled with a sufficient showing of inadequacy of prescribed ministrative relief and of threatened or impending irreparable injury flowing from delay incident to following the prescribed procedure, has been held sufficient to dispense with exhausting the administrative process before instituting judicial intervention."

Helpful also, in this interesting search for controlling authorities, are, Skinner & Eddy Corporation v. United States, 249 U.S. 557; Columbia Broadcasting System v. United States, 316 U.S. 407; Public Utilities Commission v. Fuel Gas Company, 317 U.S. 456; Miquel v. McCarl, 291 U.S. 442.

Likewise only a tripartite board, the members of which must be appointed by the President, by and with the advice and counsel of the Senate, as required by the Defense Production Act.

This is not a suit against the United States. The defendants cannot seek protection of their ultra vires acts by claiming that it is against the United States. Larson v. Domestic and Foreign Commerce Corp., 337 U.S. 682.

Quite recent cases by two three-judge statutory courts may be helpful. They are Grand Central Aircraft Co. v. Allen, et al, Northern District of California. Not yet reported. Also Dumbarton Bridge v. Norbeck, et al, Northern District of California, and Harold Peters v. Russell, Northern District of Illinois on May 21, 1953. Judge Holtzoff granted the same relief in Hoffman Machinery

Co. v. National Enforcement Commission, et al, on May 22, 1953.

The defendants concede that the entire violative payroll can be disallowed, and it is hardly logical for them to also assert that the amount of disallowance would be less than $10,000.00, or, that they would only disallow such amounts for tax purposes, and would not disallow such wage payments as items of costs under plaintiff's government contracts. They cannot assure us that other statutory and administrative penalties would not be invoked at some time in the future, because they have no control over decisions of the National Enforcement Commission.

The facts set forth in the affidavit of Paul Willis show that plaintiff will suffer irreparable damage. For an indefinite period plaintiff will be subjected to the possibility of a huge penalty in the form of a disallowance for tax purposes, and in computing costs under its government contracts.

In the case of Woodworth v. Kavanaugh, supra, plaintiff company received a determination on February 12, 1953, relating to its income tax liability for the years 1944 and 1945.

In addition, the Reconstruction Finance Corporation, and the participating bank, will call its loan a revolving credit fund from which plaintiff is making its weekly payrolls, and the Air Force under its non-procurement policy, to allow sub-contracts to be let only to financially sound companies, will direct that plaintiff receive no more sub-contracts for tooling and aircraft parts. These are realities and require relief.

From the foregoing it seems to us that irrepara-

ble injury will be suffered by the plaintiff if restraint is not granted and made permanent.

I dissent.

(S.) J. C. HUTCHESON, JR.,
Chief Judge United States Court of Appeals.

(S.) WM. H. ATWELL,
Chief Judge United States District Court.
(S.) T. WHITFIELD DAVIDSON,
United States District Judge.

(Jonco Aircraft Corp. v. Franklin, et al No. 5122 Civil)

HUTCHESON, C. J., Dissenting:

Of the clear opinion that the complaint in this case presents nothing more than a premature attack upon an administrative proceeding which is now only in its first stages, I cannot agree with the majority that a case for injunctive relief is made out. The Court of Appeals for the Fifth Circuit in Bradley Lumber Co. vs. N.L.R.B., 84 F(2) 97, thus correctly laid down the rule controlling here:

> "No doubt an investigation may, as the bill asserts, stir up some feeling among employees and cause some inconvenience by taking witnesses from their work, but these things are incident to every sort of trial and are part of the social burden of living under government. They are not the irreparable damage which equity will interfere to prevent; and a suit in equity would not wholly obviate them."

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In Volney Felt Mills, Inc. v. LeBus, we reaffirmed the rule there laid down, saying:

> "Appellant is not, as it claims, standing remediless, its constitutional rights invaded and taken away without affording it a judicial hearing. Its day in court will come, and soon, if it presses its available remedies. For that day it must, as all others similarly situated must, wait with such fortitude and patience as it can muster."

Cases from the Supreme Court supporting the same rule are Myers v. Bethlehem Corp., 303 U.S. 41; Aircraft & Diesel Equipment Corp. v. Hirsch, 331 U.S. 752.

I respectfully dissent.

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